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How the Legal System has Failed the Environmental Justice Movement

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HOW THE LEGAL SYSTEM HAS FAILED THE ENVIRONMENTAL JUSTICE MOVEMENT

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Low-income and racial minority communities bear a disproportionate burden of the negative environmental effects of our modern industrialized society.[1] In the past twenty years, a national grassroots movement has formed to challenge this problem. This movement, the "environmental justice movement," hopes "to ensure equity in the quality of the environment" in those communities.[2] The movement relies on the dedication and efforts of a diverse class of participants, including lawyers, individuals from the affected communities, and activists and organizers from the civil rights, poverty and environmental spheres.[3]

Part I of this note discusses how the environmental justice movement originated and how the term "environmental justice" differs from "environmental racism." Part II of this note will examine the evidence of environmental injustice and will explore the causes of environmental injustice. Part III of this note will consider the legal avenues that are available as potential remedies for those seeking environmental justice and will evaluate the probable success of each. Part IV of this note concludes that, because the legal system ultimately fails as a means of achieving environmental justice, the future of the environmental justice movement should revolve around the social arena.

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[1] Serena Williams, *The Fight for Environmental Justice: is the Courthouse the Appropriate Battleground?*, PUB. INTEREST L. REV. Spring 1996, at 17.

[2] *Id.* Even Vice President Al Gore acknowledged the need for the environmental justice movement. In late 1993, he told African-American church leaders that, "[t]hose who are less able to defend themselves, those who have less economic and political power within the larger community are those most often taken advantage of and victimized with a disproportionate quantity of hazardous waste and pollution and the harmful and unwanted byproducts of production." Gore continued, "It is time for this nation to respond to this crisis . . . and we are beginning to respond." Carol E. Dinkins, *Impact of the Environmental Justice Movement on American Industry and Local Government*, 47 ADMIN. L. REV. 337, 343 (1995)(citing Melissa Healy, *Administration Joins Fight for "Environmental Justice"; Pollution: Minority Communities Are Armed with New Tools from Capitol. Use of Civil Rights Act Encouraged*, L.A. TIMES, Dec. 7, 1993, at A1).

[3] *See* Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3, 8 n.15 (1995).

I. INTRODUCTION

The environmental justice movement formally began in 1982 when the protests generated by one incident in Warren County, North Carolina attracted national attention and outrage.[4] North Carolina chose Afton, an impoverished and 84% black community in Warren County, as the site for a toxic waste landfill for over 32,000 cubic yards of PCB-contaminated dirt.[5] This decision incited local residents to form the organization known as the "Warren County Citizens Concerned about PCBs" and to hold demonstrations, along with national civil rights leaders, against the landfill siting.[6] Unfortunately, the protest only resulted in the arrest of more than 500 participants, rather than resulting in keeping the landfill out of Afton.[7] However, the national attention and outrage sparked by this incident became the foundation for the environmental justice movement.[8]

The term "environmental racism" is often used interchangeably with "environmental justice,"[9] but it has its own distinct meaning. "Environmental racism" focuses only on how people of color suffer a "disproportionate share of environmental harms"[10] instead of including both the poor and racial minorities in such calculus. As urban sociologist Professor Robert Bullard notes, the term "environmental racism," in its most expansive sense, describes any environmental "policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color."[11] The term "environmental racism"

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[4] *Id.* at 8; Williams, *supra* note 1, at 17. *But see* Williams, *supra* note 1, at 17(emphasizing that struggles previous to the Warren County protest "demonstrate an earlier pursuit of social justice in an environmental context." For example, student riots at Texas Southern University were "triggered by the death of a young African-American girl who drowned at a garbage dump located next to an elementary school and a city park.").

[5] Williams, *supra* note 1, at 18.

[6] *Id.*

[7] Babcock, *supra* note 3, at 8.

[8] *Id.*

[9] Anne K. No, *Environmental Justice: Concentration on Education and Public Participation as an Alternative to Legislation*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 373, 374 n.2 (1996).

[10] Williams, *supra* note 1, at 18.

[11] Alice L. Brown, *Environmental Justice: New Civil Rights Frontier*, in ENVIRONMENTAL LAW UPDATE 1993, at 813, 815 (PLI Litig. & Admin. Practice Course Handbook Series No. 474, 1993) (quoting Robert D. Bullard, *Environmental Equity: Examining the Evidence of Environmental Racism.* LAND AND USE F., Winter 1993, at 6). Bunyan Bryant, a professor at the University of Michigan School of Natural Resources and Environment, defines "environmental racism" as "an extension of racism. It refers to those institutional rules, regulations, and policies or

was used first by the Reverend Benjamin Chavis, then with the United Church of Christ Commission for Racial Justice, when he incorporated the term into the 1991 National People of Color Environmental Summit.[12]

II. EVIDENCE OF ENVIRONMENTAL INJUSTICE

While there are numerous specific examples of environmental injustice, a description of just a few of the more prominent cases demonstrates the extent of the injustice. Athens, a 54% African-American and 43% Latino community in southern Los Angeles, California, houses a hazardous waste transfer station.[13] The station "processes about 300 55-gallon drums of hazardous waste each day before moving it to landfills."[14]

In New Orleans, Louisiana, a local chemical plant developed a gas leak, "in which a tanker car spewed an orange cloud of nitrogen tetroxide," requiring the evacuation of approximately 3000 people.[15] When the city evacuated the predominantly white neighborhoods one and a half days before the African-American neighborhoods, leaders of the local African-American community later claimed that "race was a factor in the evacuation."[16]

The South Side of Chicago, a predominantly Latino and African-American community, "has perhaps the greatest concentration of hazardous waste sites in the country, with fifty active or closed commercial hazardous waste landfills, 100 factories, and 103 abandoned toxic waste dumps."[17]

Lastly, in the west end of Louisville, Kentucky, a predominantly African-American community, "[d]ioxin, a cancer-causing substance, has been found in both the fish and the sediment in the lake" of a local park.[18] The community also contains an inactive petroleum refinery

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government or corporate decisions that deliberately target certain communities for least desirable land uses, resulting in the disproportionate exposure of toxic and hazardous waste on communities based upon certain prescribed biological characteristics." Bunyan Bryant, *Introduction in*, ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 1, 5-6 (Bunyan Bryant ed., 1995).

[12] Williams, *supra* note 1, at 18.

[13] *Id.* at 17.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Charles Lee, *Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities*, 14 VA. ENVTL. L.J. 571, 572-574 (1995).

[18] Williams, *supra* note 1, at 17.

"which still serves as storage for large amounts of chemicals."[19]

Additionally, researchers have performed four major studies which document how low income and minority communities endure disproportionate environmental harms under current environmental policies and siting decisions. The first study resulted from the unsuccessful protest of the siting decision in Warren County, North Carolina.[20] One of the protestors, Congressman Walter Fauntroy, then Chairman of the Congressional Black Caucus, instructed the United States General Accounting Office (GAO) to examine "the socioeconomic and racial composition of the communities surrounding the four major hazardous waste landfills..."[21] in the Environmental Protection Agency's Region IV.[22]

In 1983, GAO published its findings that "reported a strong correlation between race and poverty and the location of hazardous waste facilities."[23] African-Americans constituted a majority in three of the four communities surrounding the facilities.[24] "The three communities were 52%, 63%, and 90% African American, respectively."[25] Additionally, the populations of all four communities were generally poor and at least 26% of the residents earned incomes below the poverty line.[26]

The disturbing findings of the GAO report inspired the first nationwide study on the demographics of the communities housing hazardous waste sites.[27] In 1987, the United Church of Christ's Commission for Racial Justice conducted the study and entitled it "Toxic Wastes and Race in the United States."[28] The Commission performed a two-part inquiry based on 1980 census information.[29] First, the

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[19] *Id.*

[20] Willie Hernandez, Comment, *Environmental Justice: Looking Beyond Executive Order No. 12,898*, 14 UCLA J. ENVTL. & POL'Y 181, 182-83 (1996).

[21] Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 921 (1992).

[22] Serena Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 223, 225 (1995). (noting that "Eight southern states comprised Region IV: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Caroline, and Tennessee.").

[23] Maria Ramirez Fisher, Comment, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENVTL. L.J. 449, 456 (1994). GAO entitled its study, "Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities." Williams, *supra* note 22, at 225.

[24] Williams, *supra* note 22, at 225.

[25] *Id.*

[26] Dinkins, *supra* note 2, at 338.

[27] Hernandez, *supra* note 20, at 183.

[28] Lee, *supra* note 17, at 572.

[29] Hernandez, *supra* note 20, at 183-84.

Commission analyzed "the racial and socio-economic status of residents of the zip code areas"[30] surrounding both commercial hazardous waste facilities and uncontrolled toxic waste sites (UTWS).[31] The Commission then compared the demographics of those areas to the demographics of the "zip code areas that did not have such facilities" or waste sites.[32]

In performing its inquiries, the Commission scrutinized more than 415 operating commercial hazardous waste facilities and 18,164 UTWSs.[33] The Commission concluded "that race is the single best predictor of where commercial hazardous waste facilities are located, even when accounting for socio-economic factors."[34]

> In fact, the average percentage of minorities living in areas with an operating hazardous waste site was twice that of the percentage of minorities living in areas without such facilities. Further, in regions hosting two or more commercial hazardous waste facilities, the proportion of minority residents is more than triple the percentage seen in communities not hosting such a facility.[35]

The Commission also determined that race played a similar role in predicting the location of UTWSs.[36] "[T]hree out of five African-Americans and Hispanic-Americans share their neighborhoods with UTWSs."[37]

The significance of this study should not be underestimated. It directed national attention to the previously "invisible issue of disproportionate environmental contamination in poor communities and communities of color," and, as a result, "the existence of degraded and hazardous physical environments in minority, poor, and disenfranchised

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[30] Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Use Laws*, 78 CORNELL L. REV. 1001, 1010 (1993).

[31] Hernandez, *supra* note 20, at 184. *See* Been, *supra* note 30, at 1010 (defining uncontrolled toxic waste sites as "either closed and abandoned dumps, disposal facilities, factories, or warehouses that the Environmental Protection Agency identified as posing a potential threat the environment and public health").

[32] Been, *supra* note 30, at 1010; *see* Hernandez, *supra* note 20, at 184.

[33] Hernandez, *supra* note 20, at 184.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*; *See* Been, *supra* note 30, at 1011-12 (noting that the Commission found that to be a slightly higher ratio than for whites of whom about 54% reside near an UTWS).

communities became apparent and indisputable."[38]

The Environmental Protection Agency conducted the third major study when its Administrator, William K. Reilly, established the Environmental Equity Workgroup in 1990 to review the existing data of environmental injustice.[39] The Workgroup reported "that racial minority and low-income communities experience a greater than average exposure to selected air pollutants and hazardous waste facilities."[40] Furthermore, the Workgroup decided that "[t]here are clear differences between racial groups in terms of disease and death rates," but that unfortunately, "[t]here are . . . limited data to explain the environmental contribution to these differences."[41]

The National Law Journal (NLJ) performed the last influential environmental injustice study in 1992 when it investigated the "relationship between race and the enforcement of environmental laws" by the Environmental Protection Agency.[42] The NLJ examined the past seven year's worth of environmental lawsuits and all of the residential toxic waste sites in the Superfund program under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[43]

The study discovered "that the federal government is less responsive to environmental. . .needs in minority communities than it is to the needs of predominantly white neighborhoods."[44] The study concluded that white communities receive dramatically higher penalties under hazardous waste laws (as much as 500%), quicker placement on the national priority action list, and up to a 42% more rapid cleanup

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[38] Lee, *supra* note 17, at 573. When the United Church of Christ, the Center for Policy Alternatives, and the National Association for the Advancement of Colored People updated the Commission's 1987 study to 1993, they concluded that the injustice had worsened. After the groups evaluated 530 commercial hazardous waste facilities with 1990 U.S. census data updated to 1993, their report "found that minorities were 47% more likely than caucasians to live near a toxic waste site in 1993. Additionally, it noted that the percentage of minorities residing adjacent to toxic waste dumps increased from 25% in 1980 to nearly 31% in 1993." Stacy Hart, *A Survey of Environmental Justice Legislation in the States*, 73 WASH. U. L. Q. 1459, 1462 (1995).

[39] Williams, *supra* note 22, at 225; Fisher, *supra* note 23, at 226.

[40] Williams, *supra* note 22, at 226. But the report also found that the "exposure did not always result in immediate or acute health effects." *Id.*

[41] ENVIRONMENTAL PROTECTION AGENCY, PUB NO. 230-R-92-00078, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 11 (1992). Note that, while the Workgroup recommended that the EPA should prioritize environmental injustice issues higher and improve the amount and quality of its communications with minority and poor communities, its recommendations were incomplete. Notably absent were proposals for "statutory solutions for victims of environmental inequity seeking damages for the harms they have suffered," and proposals for "way[s] of preventing those harms before they were incurred by the minority and low-income communities." Williams, *supra* note 22, at 226.

[42] Brown, *supra* note 11, at 815.

[43] *Id.*

[44] *Id.*

response.[45] The white communities also receive more stringent cleanup programs.[46]

Although "the weight of the evidence is persuasive that minorities and low income populations suffer a disproportionate share of the environmental burdens of an affluent society,"[47] and suffer a disproportionate government response, there is little agreement among scholars about what is the ultimate cause of the injustice. Nevertheless, it seems clear that one of the contributing factors is racism, both in environmental policy and siting decisions.[48]

As Professor Derrick Bell proclaimed in a recent speech, "The fact is: racism is far from dead in the last decade of twentieth century America. The civil rights gains, so hard won, are being steadily eroded. Despite undeniable progress for many, no African American is insulated from incidents of racial discrimination." Racism is ingrained in our culture. The mark of racism has been etched into our political and socio-economic institutional structures and into our national psyche. Although overt racism is against the law, conscious and unconscious racist attitudes are still widespread. [49]

However, rather than blaming the environmental injustice on intentional discrimination, critics often explain that economics or "market forces" cause the injustice.[50] Because minority and poor communities suffer from decreased property values, those locations financially appeal to decision makers. Those decision makers obviously want to choose the least expensive sites to build environmentally hazardous facilities.[51]

Additionally, commentators attribute environmental injustice to

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[45] Hernandez, *supra* note 20, at 190.

[46] *Id.* at 190-91 (stressing how "[a]t minority sites, the EPA chooses 'containment' more frequently than permanent 'treatment,' the [clean-up] method preferred under the law. In contrast, the EPA orders treatment 22% more often in white communities than in minority communities").

[47] Babcock, *supra* note 3, at 9. *But see* Been, *supra* note 30, at 1014 (asserting that the strength of the environmental justice studies' evidence "is limited by the imprecision of the studies' definition of the neighborhoods compared").

[48] Babcock, *supra* note 3, at 10.

[49] *Id.* at 10-11. *But see* Been, *supra* note 30, at 1014 (contending that the evidence from environmental justice studies fails to prove that intentionally discriminatory siting decisions cause the disproportionate environmental burdening).

[50] Babcock, *supra* note 3, at 12 ("Market forces can also play a large role in the inequitable distribution of environmental hazards."). *See also* Fisher, *supra* note 23, at 458. One characteristic response to charges of environmental racism in siting decisions for hazardous waste facilities "portrays the determination of disposal facility locations as an economic ... issue, not a racial issue." *Id.*

[51] Babcock, *supra* note 3, at 12; *see also* Fisher, *supra* note 23, at 458-59.

the political disenfranchisement of the poor and minorities.[52] Those communities' political weakness prevents them from being well-represented at all levels of government.[53] Thus, politicians and policy makers "are not informed about the environmental problems that particularly afflict communities of color and the poor. There is also little political pressure to address these problems, and often no significant political opposition in these communities when faced with [environmental threats] . . . ."[54] The poor and minorities' political weakness also frustrates the ability of their communities to campaign successfully against hazardous waste facility siting decisions or other types of environmental injustice.[55]

Furthermore, critics charge "white flight" with causing the disparate impact.[56] Arguably, a community chosen for a hazardous waste facility site may not have been predominately poor or minority when the facility was sited.[57] Instead, the local residents who are wealthy or Caucasian could have moved out of the neighborhood in response to the siting. Because of the mass flight, housing in those neighborhoods became less expensive and more available. Then the poor or people of color, who struggle to find housing which is affordable and offered on a non-discriminatory basis, could have moved in.[58]

These theories do suggest that factors other than intentional discrimination against impoverished or minority communities may contribute to the disproportionate environmental burdening of those communities. However, they are "insufficient explanation[s] of the disparity" and they fail to justify the overwhelmingly discriminatory impact of current environmental policies and siting decisions.[59]

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[52] Babcock, *supra* note 3, at 13-14; *see also* Fisher, *supra* note 23, at 459 ("The political weakness of minority groups also contributes to the likelihood that waste facilities will be located in communities of color.").

[53] Babcock, *supra* note 3, at 13.

[54] *Id.* at 14.

[55] *See* Fisher, *supra* note 23, at 459.

[56] Hernandez, *supra* note 20, at 186.

[57] Been, *supra* note 30, at 1016 ("Most studies compare the current socio-economic characteristics of communities that now host various LULUs [locally undesirable land uses] to those that do no host LULUs. In doing so, they fail to examine the communities' demographics at the time the facility was sited.").

[58] *Id.* at 1016. *But see id.* at 1019 (stressing that it is "not universally true" that wealthy residents always will flee environmental hazards. "In fact, the wealthy will move away only if the negative impact of the LULU is greater than the costs of relocating.").

[59] Fisher, *supra* note 23, at 460.

III. POTENTIAL LEGAL REMEDIES FOR ENVIRONMENTAL INJUSTICE

There are a couple of avenues of litigation that protestors can pursue in hopes of either remedying present environmental injustice or preventing future injustice.[60] Injustice protestors may bring suits under civil rights laws or under tort theories.[61]

A. Civil Rights Litigation

One of the main avenues of environmental justice litigation is under civil rights laws such as the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[62] Unfortunately, civil rights laws have not accomplished what the plaintiffs and their supporters had hoped. As a matter of fact, "none of these laws, either individually or in the aggregate, has yet directly helped plaintiffs with their specific claims" of environmental injustice.[63]

1. Equal Protection

Commonly, injustice plaintiffs have brought their claims under the Equal Protection Clause of the Fourteenth Amendment.[64] Disappointingly, no equal protection plaintiff has succeeded. *Washington v. Davis*[65] and *Arlington Heights v. Metropolitan Housing Development Corp.*[66] both severely limit the effectiveness of Equal Protection claims. Under both cases, "the Supreme Court requires a showing of both statistically demonstrable disparate impact and specific discriminatory intent for Equal Protection claims."[67] And while injustice plaintiffs "have been able to show a pattern of disparate impact, they have been unsuccessful in showing a discriminatory purpose in siting

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[60] *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 524 (1994) ("[S]iting disputes have been the primary context for environmental justice litigation.").

[61] *See* Williams *supra* note 1, at 17; Babcock, *supra* note 3, at 15-21; Cole, *supra* note 60, at 536.

[62] U.S. CONST. amend. XIV; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994); Babcock, *supra* note 3, at 18-20.

[63] Babcock, *supra* note 3, at 19.

[64] U.S. CONST. amend. XIV; Babcock, *supra* note 3, at 19.

[65] 426 U.S. 229 (1976).

[66] 429 U.S. 252 (1977).

[67] Babcock, *supra* note 3, at 19.

decisions."[68]

The original case to utilize the Equal Protection Clause as its basis for its environmental justice lawsuit was a 1979 Texas case, *Bean v. Southwestern Waste Management Corp.*[69] In *Bean*, the plaintiffs filed a motion for a preliminary injunction to challenge a solid waste facility siting decision that they considered to be motivated by racial discrimination.[70] The Texas Department of Health granted the defendant, Southwestern Waste Management, a permit to operate a waste facility in an area of Houston and Harris County that was 1700 feet away from a predominantly black high school that had no air conditioning.[71] The plaintiffs argued that because the siting decision was motivated by racial discrimination, the permit should be revoked.[72]

The plaintiffs proposed two theories of liability which they believed established discriminatory intent by the Department.[73] First, the plaintiffs argued that the siting decision was part of a "pattern or practice" by the Department of "discriminating in the placement of solid waste sites."[74] Second, the plaintiffs argued that the Department's siting decision, "in the context of the historical placement of solid waste sites . . . constituted discrimination."[75]

The court rejected both theories because it found the statistical data insufficient to prove that the Department's siting decision was motivated by the required "intent to discriminate on the basis of race."[76] The court concluded that the statistics disproved a pattern of discrimination because city-wide, 58.8% of the sites granted permits by TDH were located in census tracts with 25% or less minority population at the time of their opening and 82.4% of the sites granted permits by TDH were located in census tracts with 50% or less minority population at the time of their opening.[77]

Additionally, the court determined that the statistics refuted the argument that the permit approval amounted to discrimination in the

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[68] Williams, *supra* note 1, at 19 (citing East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb county Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D.Ga. 1989), *aff'd* 896 F.2d 1264 (11th Cir. 1989); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D.Va. 1991).)

[69] Bean v. Southwestern Waste Management Corp, 482 F. Supp. 673 (1979); *see* Cole, *supra* note 60, at 523.

[70] *Bean*, 482 F.Supp. at 674-675.

[71] *Id.* at 675, 679-680.

[72] *Id.* at 675.

[73] *Id.* at 677-679.

[74] *Id.* at 677.

[75] *Id.* at 678.

[76] *Id.* at 677.

[77] *Id.*

context of the historical placement of waste sites. First, there were two solid waste sites to be used by Houston. While the site at issue was in a census tract with a primarily minority population (58.4%), the other cite was in a primarily Anglo census tract (81.6%).[78] Second, after analyzing the solid waste sites located in the target area, the court found it "very hard to conclude that the placing of a site in the target area evidence[d] purposeful racial discrimination" because half of the sites were in census tracts with more than 70% Anglo population.[79] Third, when evaluating the city as a whole, "Houston consisted of 42.5% minority tracts and 57.5% Anglo tracts."[80] And 42.2% of the solid waste sites were located in minority tracts and 57.8% were located in Anglo tracts. "The difference between the racial composition of census tracts in general and the racial compositition of census tracts with solid waste sites is, at best, only 0.3%. That is simply not a statistically significant difference."[81] Thus, the court refused to grant the plaintiffs their preliminary injunction.[82]

Despite of the plaintiffs' court loss, their case did result in some positive achievements. Their case is "widely regarded" as originating the litigation aspect of the environmental justice movement.[83] Also, "Houston restricted the dumping of garbage near public facilities such as schools, a form of zoning that was unprecedented in the only major U.S. city without zoning laws."[84] Furthermore, "the Texas Department of Health began to require demographic data from landfill proponents . . . ."[85] And most importantly, "the idea of using civil rights law to combat environmental racism was born."[86]

There are two other principal cases where injustice plaintiffs have relied on the Equal Protection clause. These were a 1990 Georgia

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[78] *Id.* at 678.

[79] *Id.* The court so concluded even though the target area has predominantly minority population (70%) and "contains 15% of Houston's solid waste sites, but only 6.9% of its population." *Id.*

[80] *Id.* at 679.

[81] *Id.* The court defined a "minority census tract" as one with more than 39.3% minority population since Houston's population is 39.3% minority. *Id.*

[82] *Id.* at 680. But Judge McDonald, who wrote the opinion, did leave the plaintiffs with the dubious comfort that if the court was the Texas Department of Health, "it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school, parituclary one with no air conditioning." The judge went on to say, "It is not my responsibility to decide whether to grant this site a permit. It is my responsibility to decide whether to grant the plaintiffs a preliminary injunction." *Id.* at 679-680.

[83] Cole, *supra* note 60, at 539.

[84] *Id.*

[85] *Id.* at 539 n.79.

[86] *Id.* at 539.

case, *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning and Zoning Commission,*[87] and a 1991 Virginia case, *R.I.S.E., Inc, v. Kay.*[88] These plaintiffs also were unsuccessful because, similar to the plaintiffs in *Bean*, their evidence was insufficient to prove discriminatory intent.[89]

In *East-Bibb*, the plaintiffs sought to enjoin the local planning and zoning commission from granting a use permit to Mullis Tree Service for operation of a private landfill in the plaintiff's neighborhood.[90] The plaintiffs, the East-Bibb Twiggs Neighborhood Association and two individual residents, contended that the "Commission's choice of a landfill site denied them equal protection of the law because the decision affected more black persons than white persons."[91] The proposed landfill site was located in a census tract which housed 3,367 black residents and 2,149 white residents.[92]

The court ruled that the plaintiffs' allegation that the landfill would affect more black than white persons failed to establish an equal protection violation. Their evidence was insufficient "to demonstrate that the Commission acted with a [racially] discriminatory intent when it approved Mullis's application, or that the Commission engaged in a historical pattern of discriminatory conduct."[93]

First, the Commission did not act with a discriminatory intent when viewed against its historical background.[94] The Commission had never before located a landfill in a majority black area. Also, in previous zoning decisions, the Commission frequently refused to grant the applicant's permit in response to the local opposition. Finally, the Commission made a statement showing it recognized that some areas in the community still suffered from racial discrimination. That recognition probably encouraged the Commission "to exercise vigilance in guarding against such unprincipled influence."[95]

Second, plaintiffs failed to establish intent by a historical pattern of discriminatory conduct by the Commission. The commission had

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[87] East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1990).

[88] R.I.S.E., Inc., v. Kay, 768 F.Supp. 1144 (E.D.Va. 1991).

[89] East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibbs Planning & Zoning Comm'n, 896 F.2d 1264, 1267 (11th Cir. 1990); R.I.S.E., Inc., v. Kay, 768 F.Supp. 1144, 1150 (E.D.Va. 1991).

[90] East-Bibb, 896 F.2d at 1264-65.

[91] *Id.* at 1265.

[92] *Id.* at 1264.

[93] *Id.* at 1267.

[94] East-Bibb, at 885.

[95] *Id.* at 885-886.

approved only one other landfill, and it was located in a census tract which contained a predominantly white population. The tract housed 1045 white residents but only 320 black residents.[96]

In *R.I.S.E.*, the plaintiff sued the County Board of Supervisors for allegedly violating the plaintiff's right to equal protection under the law when it placed a landfill in a predominantly black area of the county.[97] In the half-mile radius surrounding the landfill site at issue, the population was 64% black and 36% white.[98]

Even though this plaintiff, unlike the plaintiffs in the other equal protection cases, could show a "historical placement of landfills in predominantly black communities" by the Board,[99] the court still rejected the plaintiff's claim. The plaintiff failed to provide any evidence that the Board acted with the required discriminatory purpose.[100] The Board's administrative steps revealed nothing unusual or suspicious.[101] The Board was drawn to the site at issue because geotechnical tests had already been performed on it. The tests revealed that the site was "environmentally suitable for the purpose of landfill development."[102] Although the Board previously prohibited a landfill from operating in a predominantly white area, yet approved the operation of this landfill in a predominantly black area, such actions were "based not on the racial composition of the respective neighborhoods in which the landfills are located but on the relative environmental suitability of the sites."[103]

Because of the problem that these plaintiffs encountered and that all future plaintiffs will encounter in proving the required intentional discrimination, "the equal protection clause is no longer a viable cause of action in most [environmental justice] cases."[104] Indeed, because of the apparently insurmountable intent requirement, "[c]ivil rights lawyers

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[96] *Id.* at 880, 884.

[97] R.I.S.E. Inc., v. Kay, 768 F.Supp. 1144, 1145 (E.D.Va. 1991). The plaintiff "R.I.S.E., Inc. (Residents Involved in Saving the Environment) is a bi-racial community organization formed for the purpose of opposing the development of the proposed regional landfill that is the subject of this case." *Id.*

[98] *Id.* at 1148.

[99] *Id.* at 1149. The board had placed three previous landfills in predominantly black communities. In 1969, a landfill was developed in a community that was 100% black. In 1971, a landfill was sited in an area that was 95% black. In 1977, a landfill was placed in location that was 100% black. *Id* at 1148.

[100] *Id.* at 1149.

[101] *Id.* at 1149-50.

[102] *Id.* at 1150.

[103] *Id.* at 1150. The court noted that the prohibited landfill was an "environmental disaster" -- dumping began before any tests were performed, later tests indicated that there was incinerator ash in the ground water, and there was no clay soil to prevent ground water pollution. *Id.* at 1149.

[104] Cole, *supra* note 60, at 540.

have opined that environmental justice cases using federal equal protection claims will be 'certain losers'."[105]

2. Title VI of the Civil Rights Act of 1964

Instead of challenging environmental injustice under the Equal Protection Clause and its accompanying intent requirement, injustice protestors may be better served by bringing their claims under Title VI of the Civil Rights Act of 1964.[106] "Title VI bars discrimination on the basis of race, color, or national origin under federally funded programs."[107] This avenue of litigation may be preferable to plaintiffs suffering from environmental injustice because it has a less stringent intent requirement.[108] Although Title VI litigants must prove that the defendant intentionally discriminated, federal regulations and case law hold that a "discriminatory effect (or disparate impact) alone is enough to show unlawful discrimination."[109] Thus, civil rights injustice plaintiffs have a lighter burden of proof under Title VI than under an equal protection challenge.

But Title VI does present plaintiffs with one extra litigation hurdle that restricts its usefulness for plaintiffs.[110] It requires plaintiff to show "a nexus to federal monies."[111] But this hurdle is not as difficult to overcome as it might seem because of Title VI's "broad coverage."[112] Most state and local agencies that a plaintiff might want to sue are probably covered by Title VI "[b]ecause many state agencies receive federal funding . . ., and because Title VI broadly defines 'program or activity receiving Federal financial assistance.'"[113]

While Title VI does appear to have great potential for environmental injustice plaintiffs, it has not yet directly provided them

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[105] *Id.* at 540-41. *But see* Dinkins, *supra* note 2, at 349 (emphasizing that some equal protection plaintiffs have attained success through settlements. For example, "In 1983, a company reportedly paid $24 million to the residents of African-American Triana, Alabama, to settle a case alleging contamination of the town's residents, the water supply, and the residents' favorite fishing pond. Two years later, another company paid $20 million to residents of a West Dallas public housing project to settle litigation.").

[106] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq.; Cole, *supra* note 60, at 531.

[107] Fisher, *supra* note 23, at 471.

[108] *Id.* at 472; Cole, *supra* note 60, at 531.

[109] Cole, *supra* note 60, at 531.

[110] Fisher, *supra* note 23, at 472-73.

[111] *Id.* at 473.

[112] Cole, *supra* note 60, at 532.

[113] *Id.* at 532. Title VI's broad applicability is enlarged further because it "applies to an entire agency if even one part of that agency receives federal funding." *Id.* at 532.

with a courthouse victory.[114] However, the plaintiffs in *Crest Street Community Council, Inc., v. North Carolina Department of Transportation* attained an indirect victory when their Title VI freeway siting claim prompted North Carolina to negotiate a settlement with them rather than undergo a courtroom battle.[115]

In *Crest*, neighborhood organizations filed an Administrative Complaint with the United States Department of Transportation (USDOT) to protest the North Carolina Department of Transportation's plan to extend a freeway through their predominantly black, low-income neighborhood.[116] They contended that the freeway proposal was in violation of Title VI and thus any further planning or construction of the freeway should be prohibited until North Carolina was in compliance with all applicable laws.[117]

When USDOT's Director of the Office of Civil Rights made a preliminary finding that there was "reasonable cause to believe that construction according to the NCDOT proposal would constitute a *prima facie* violation of Title VI" and one of its regulations,[118] the defendants initiated "extensive negotiations" with the plaintiffs to reconcile their differences.[119] Both parties agreed to a Final Mitigation Plan that established what efforts the city and NCDOT were required to make to mitigate the freeway's detrimental impact on the plaintiffs' neighborhood.[120]

In the Plan, the defendants agreed to develop a new community site in the same area so the neighborhood residents could continue to be an intact community. Furthermore, "the defendants moved the proposed highway right-of-way and modified an interchange so as to preserve the

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[114] Babcock, *supra* note 3, at 21. In fact, in one Ohio case, the plaintiffs lost on the merits. While the plaintiffs did demonstrate "that the routing of the proposed I-670 freeway would be through neighborhoods that ranged from fifty to ninety percent African-American -- according to the Court a 'prima facie showing of disparate effect upon racial minorities' -- the defendant was able to overcome that hurdle by showing that alternative routes would have had more negative impact on African-American neighborhoods." Cole, *supra* note 60, at 533 (citing Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984).).

[115] Cole, *supra* note 60, at 533; Crest Street Community Council, Inc. v. North Carolina Dep't of Transp., 598 F.Supp. 258 (1984).

[116] *Id.* at 259-260.

[117] *Id.* at 260.

[118] *Id.* The regulation, 49 C.F.R. section 231.5(b)(3), states, "[i]n determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act of this part." *Id.* at 260.

[119] *Id.* at 260.

[120] *Id.* at 261.

community church and park."[121] The defendants estimated that the cost of these mitigation efforts would be over three million dollars. The plaintiffs admitted that this settlement provided them with "very substantial relief."[122]

Crest suggests that Title VI has some potential, albeit still unproven, as a litigation tactic for environmental injustice plaintiffs.[123] And while that unproven potential is better than the certain failure of Equal Protection litigation, until there is a concrete Title VI courtroom victory, this litigation avenue can provide only hope of, but no guarantee of, successful results to injustice plaintiffs.

However, in spite of the failure of most of these individual civil rights cases, there are some benefits to bringing civil rights claims rather than choosing other forms of litigation.[124] The first benefit is that the litigation "nam[es] names."[125] By bringing a civil rights suit against named local government officials, the plaintiffs' morale is raised because the suit "allows a community to say 'officially' what has existed for a long time."[126] The suit permits the plaintiffs to say "that the [government] official being sued is engaging in racist practices."[127]

Civil rights litigation also enables the plaintiffs to gain allies.[128] "By calling a dispute a civil rights struggle, a group may gain allies from other organizations in the region who previously may not have recognized the civil rights implication of the community's struggle for environmental justice."[129]

Third, civil rights claims have the potential benefit of educating the judiciary.[130] "While courts have not yet ruled favorably on an environmental justice civil rights case, the increasing number of such cases being brought may be having an effect in educating the judiciary."[131] And as our judicial history about school desegregation proves, educating the judiciary about civil rights can result in eventual

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[121] *Id.*

[122] *Id.*

[123] Cole, *supra* note 60, at 534.

[124] *Id.* at 541-542.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 543.

[129] *Id. But see id.* at 543 (noting how bringing civil rights litigation can be a hindrance because "[a]t the same time, the group may lose allies who are squeamish about talking about race issues").

[130] *Id.* at 543.

[131] *Id.* at 543.

favorable results.[132]

B. Tort Theory Litigation

Rather than addressing their environmental grievances through civil rights litigation, injustice plaintiffs instead could utilize tort theories such as nuisance, trespass, or strict liability for abnormally dangerous activities as the bases for their suits.[133] While a few plaintiffs have been successful, this litigation tactic still presents significant drawbacks to injustice litigants.[134]

The most important limitation is that tort theories fail to facilitate or even allow any discussion in the courtroom regarding plaintiffs suffering environmental harms because of their race or economic standing in the community.[135] Second, because expert testimony is generally required to prove causation and damages, tort-based injustice claims may be prohibitively expensive for the affected communities.[136] Third, the plaintiffs are often blamed for causing their own health injuries.[137] "Poor people and people of different backgrounds from their jurors generally are less likely to successfully fend off this defense tactic . . . ."[138] Lastly, each individual tort theory has its unique weaknesses.

Nuisance plaintiffs must be able to prove they suffer a significant harm from the nuisance which they will not be able to do if they suffer "widespread, but individually modest, harms."[139] Additionally, to be a nuisance, the land use must be unreasonable. Unfortunately, however,

> in determining whether a land use is "unreasonable," most states use a balancing test that weighs the gravity of the harm to [the] plaintiff against the utility of [the] defendant's conduct. Among the factors for determining the utility of [the] defendant's conduct is the social value attached to the primary purpose of the

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[132] *Id.* ("Many of the first cases brought under civil rights laws to challenge such [school] segregation failed, and it was only through years of strategically brought lawsuits . . . that civil rights lawyers finally prevailed in court").

[133] Williams, *supra* note 1, at 19.

[134] *See id.* at 17.

[135] *See id.* at 27.

[136] *See* Williams, *supra* note 22, at 250.

[137] Allan Kanner, *Environmental Justice, Torts and Causation*, 34 WASHBURN L.J. 505, 509 (1995).

[138] *Id.*

[139] Williams, *supra* note 1, at 19.

> conduct. Thus, a court may find significant harm and yet grant no relief because the value of the activity to society is greater than the harm; *in effect, the plaintiffs may be forced to subsidize the activity by bearing the burden while society as a whole reaps the benefits.*[140]

While anticipatory nuisance plaintiffs have the possibility of attaining the "optimal result," prevention of the environmental harm, they first must overcome a major difficulty.[141] They must prove "that an activity or structure is highly likely to be a nuisance without the powerful evidence of the actual stench, vermin and traffic jams."[142]

Trespass plaintiffs must establish a "substantial harm" in order to recover. Thus, they are disadvantaged by knowing that the scope of liability of their defendant is limited.[143]

Finally, plaintiffs suing under the theory of strict liability for abnormally dangerous activities are restrained by one of the factors used by the court to determine if an activity is unusually dangerous -- the "extent to which its value to the community is outweighed by its dangerous attributes."[144] Therefore, "a court may find that an industrial activity with great economic value to the community in terms of its employment and tax base is not abnormally dangerous."[145]

IV. CONCLUSION

Because of the numerous hurdles, drawbacks, and low success rates that litigation offers injustice plaintiffs, the legal system ultimately fails as a means of achieving environmental justice. Therefore, the environmental justice movement should shift its focus from the legal arena to the social arena. Such an approach has several advantages. For example, the social arena holds unlimited potential unrestrained by negative precedent and case law. Because of the proven failure of litigation now mandated by *stare decisis*, the injustice protestors should strive to increase and enliven the grassroots aspect of the environmental justice movement.

The movement can accomplish this refocusing by using ongoing and future litigation mainly as a tool to provoke media attention to the

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[140] *Id.* (emphasis added).
[141] Williams, *supra* note 22, at 249-50.
[142] *Id.* at 250.
[143] Williams, *supra* note 1, at 21.
[144] *Id.*
[145] *Id.* at 21, 27.

movement. Such media attention may serve to educate those residing in the affected communities about the environmental hazards and energize them into protest action. The media attention also simultaneously raises the social consciousness of those outside the affected communities.[146] As Derrick Bell notes, "[l]itigation can and should serve lawyer and client as a community-organizing tool, an education forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public support."[147]

Additionally, the movement can initiate and continue noticeable and colorful protests, acts of civil disobedience, and campaigns against potential unjust siting decisions.[148] Only through these actions will the movement achieve success. It will not only educate those who make and oversee environmental decisions and policies but also will encourage or politically force them to change their environmental values. The under-used social arena offers the only real promise of success for the environmental justice movement.

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[146] *Id.* at 27; Gerald Torres, *Changing the Way Government Views Environmental Justice*, in ENVIRONMENTAL LAW at 561, 564-67 (ALI-ABA Course of Study C981, 1995).

[147] Cole, *supra* note 60, at 541.

[148] *See* Been, *supra* note 30.